**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-003572

First-tier Tribunal No: DA/00172/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 10 June 2024**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**
**DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MUSTAPHA NJIE**
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms E Doerr of Counsel, instructed by David Benson Solicitors

**Heard at Field House on 30 October 2023**

## DECISION AND REASONS

## Introduction and Background

1. The Secretary of State for the Home Department appeals against a decision of First-tier Tribunal Judge Cameron promulgated on 4 May 2022 allowing Mr Mustapha Njie's appeal against a deportation decision dated 23 March 2021.

2. In particular the Secretary of State challenges the key finding of the First-tier Tribunal to the effect that it had not been shown that the Appellant "*represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" (Decision and Reasons, paragraph 63).

3. Although before us the Secretary of State is the appellant and Mr Njie is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to the Secretary of State as the Respondent and Mr Njie as the Appellant.

4. The Appellant is a citizen of Gambia born on 28 February 1997.

5. Although there is no accurate record of the Appellant's date of entry to UK, it is known that on 13 May 2015 he was issued with a residence card as the direct descendant of his Spanish national mother, valid to 13 October 2020.

6. Further to this, in the proceedings before the First-tier Tribunal the Respondent accepted that the Appellant had lawful residence under EEA Regulations as a family member of an EEA national, but asserted that he had not acquired a permanent right of residence: as such in respect of any issue of deportation the Appellant enjoyed only the lowest level of the three tiers of protection – i.e. was deportation justified on grounds of public policy or public security. This premise was accepted on the Appellant's behalf at the hearing before the First-tier Tribunal (Decision at paragraph 25, and similarly at paragraph 48).

7. On 2 September 2020, at Lewes Crown Court, the Appellant was sentenced to 14 months imprisonment for fraud by abuse of position between 13 February 2019 and 26 September 2019. Whilst working in a care home the Appellant had stolen about £4000 from a vulnerable mental health patient between the given dates.

8. The sentencing remarks of His Honour Judge Tain are reproduced in the Respondent's bundle before the First-tier Tribunal at Annex B; they are also quoted at paragraph 25 of the Notice of Decision. An apparent quotation is set out at paragraph 27 of the Decision of the First-tier Tribunal: however this has been edited in such a way that it is neither complete nor consistently verbatim; whilst no harm has been done to the overall meaning, it is to be noted that a matter of potential significance – that the Appellant had at one point attempted to blame the victim - is omitted.

9. The Appellant has no other convictions before or since.

10. On 1 October 2020 the Respondent wrote to the Appellant notifying him of an intention to make a deportation order. A subsequent response was received from the Appellant's mother.

11. On 23 March 2021 the Respondent made a deportation decision in accordance with regulation 27 of the Immigration (European Economic Area) Regulations 2016. The Respondent considered: the Appellant had been convicted of a serious offence as reflected in the sentence given; deportation to Gambia would not prejudice prospects of rehabilitation; the Appellant posed a genuine, present, and sufficiently serious threat to the interests of public policy if allowed to remain; moreover the Appellant had

not been lawfully resident in the UK for most of his life; it was not accepted that he was socially and culturally integrated in the United Kingdom; it was not accepted that there would be any significant obstacles to his integration into Gambia; there were no compelling circumstances to outweigh the public interest in deportation.

12. The Appellant appealed to the IAC.

13. On 27 May 2021 the Appellant became eligible for release from prison in respect of his criminal sentence. However, he was not immediately released but held under powers of immigration detention. On 2 July 2021 the Appellant was released from immigration detention.

14. The appeal was heard on 13 April 2022. It was allowed for reasons set out in Decision and Reasons promulgated on 4 May 2022.

15. The analysis of the First-tier Tribunal focuses on the application of regulation 27(5)(c) of the Immigration (European Economic Area) Regulations 2016 – "*the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent*"

16. Having determined this issue in the Appellant's favour, finding "*The appellant is at low risk of reoffending and his current situation does not indicate that some of the factors which were present at the time of his offending are currently risk factors*" (paragraph 63), and noting in substance that this was determinatively favourable of the appeal ("*I am not therefore satisfied that the decision to deport the appellant can come within regulation 27*" (paragraph 64)), the Judge commented "*I do not need to look at any other factors set out in regulation 27*" (paragraph 64).

17. The Respondent applied for permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal on 19 May 2022, but subsequently granted on renewal by Upper Tribunal Judge Hanson on 21 September 2022. In material part the grant of permission to appeal is in these terms:

> "*I find arguable merit in the grounds in that the Judge may have failed to properly understand the assessment in the OASys report which concluded the appellant posed a medium risk to the public, which does not support the conclusion that the appellant poses no genuine present or sufficiently serious risk.*
>
> *It cannot be said at this stage that had the risk factor been properly assessed the outcome will have been the same which is a matter that can be properly discussed on the next occasion.*"

18. The Appellant has not filed a Rule 24 response.

## Analysis of 'Error of Law' challenge

19. For the reasons set out below we find that there is substance to the Respondent's challenge to the Judge's approach to the contents of the OASys report, signed on 16 July 2021 and bearing a date of printing of 20 October 2021 (Appellant's Supplementary Bundle pages 1-49).

20. There was discussion at the hearing as to the extent we should address the approach generally to be taken when considering an OASys report. However, for the reasons given below, we have decided that we can address that element of the Respondent's case in short terms.

21. The First-tier Tribunal Judge's consideration of the OASys assessment begins at paragraph 28. Amongst other things the Judge appropriately notes the following features of the assessment:

> (i) "*This indicates at section 1 under Predictors that there is a 10% chance of the appellant committing offending in the first year of discharge and an 18% of him committing offending within two years of discharge. It also indicates his serious risk of recidivism is 0.29% which is Low.*" (paragraph 28).
>
> (ii) "*At R 10.6 it indicates that the balance of risk to the public is medium.*" (paragraph 37).
>
> (iii) "*The report at R 11.12 does confirm that the appellant is assessed as a medium risk to the public but is very motivated to address his offending behaviour.*" (paragraph 38).

22. The evaluation of whether or not a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society may be informed by considering the risk as a product of two factors – (a) the likelihood of an offence being committed, and (b) the impact of any likely offence. It may readily be understood that the potential threat to the fundamental interests of society posed by a person who is at low risk of committing offences with a low risk to the public, is different from the potential threat posed by a person who is at low risk of committing offences with a medium risk to the public.

23. The OASys predictor scores identify the Appellant as low risk of re-offending. If he were to reoffend, he is a medium risk to the public, particularly in respect of persons with whom he is in a position of trust or with whom he has access to their bank details. The risk is identified as being greatest if the Appellant is unable to manage his finances and perceives himself to be in a position of financial need.

24. The concern that arises in the instant case is that the Judge seemingly lost sight of the OASys evaluation that in respect of the impact of any likely offence the Appellant is a medium risk to the public.

25. In the section of the Decision under the sub-heading 'Conclusions' (paragraph 47 *et seq*.) the Judge makes two reference seemingly pursuant to the OASys assessment of risk:

(i) "*The appellant has been assessed as at low risk of reoffending and risk of serious harm to the public so long as he is able to maintain the positive lifestyle set out in the report.*" (paragraph 55).

(ii) "*I accept that simply because he is a low risk of reoffending and a risk to the public does not of itself negate that should he face similar circumstances he would not revert to offending.*" (paragraph 60).

26. Both of these passages are problematic in that they omit any reference to a 'medium' risk to the public. Indeed, in our judgement, the only sensible reading is that the adjective 'low' operates both in respect of the risk of reoffending and the risk to the public. This is in error.

27. We note and acknowledge Ms Doerr's submission that there was scope for interpreting both passages as being ambiguous: that perhaps 'low' only attached to the risk of reoffending, and that the Judge was otherwise identifying – unobjectionably – that there was also 'a' risk to the public. She suggested that the word 'medium' could be 'read in'. We are not attracted by that submission. In any event it seems to us in a matter so fundamentally central to the evaluation being undertaken pursuant to regulation 27(5)(c), clarity of expression was required.

28. We note that paragraphs 28-39 of the Decision have the appearance of a summarised recitation of the contents of significant aspects of the OASys assessment. They do not contain anything of significance by way of comment or observation of the Judge. We have noted Ms Doerr's submission to the effect that these passages indicate the Judge's clear understanding of the contents of the report. However, ultimately we are not satisfied that we can safely regard such recitation as equivalent to understanding. We do not accept that we can safely imply from the recitation of the word 'medium' at paragraphs 37 and 38 that the Judge had in mind that the risk to the public was 'medium' when writing paragraphs 55 and 60. Even if that were what the Judge had in mind, he has not made it adequately clear in the written reasons where he appears to use the adjective 'low' to describe the risk to the public.

29. We accept Ms Doerr's submission that the Judge set out with adequate clarity and cogency reasons why the level of risk identified in the OASys report could be considered to have been reduced with reference to the Appellant's circumstances and attempts to address his offending behaviour. However, we do not accept that such cogency renders the identified mistake immaterial. Although the Judge may have had a sound basis, soundly reasoned and soundly expressed, for considering the level of risk to have reduced since the date of the OASys assessment, if he misunderstood the level of risk identified in the OASys report then any analyse of the impact of any changes is flawed because it starts from the wrong baseline.

30. We do not accept Ms Doerr's submission that this point was not adequately pleaded in the Respondent's Grounds of Appeal.

31. Unsurprisingly given that it was the determinative issue addressed by the First-tier Tribunal, the Grounds seek to impugn the Judge's finding that the Appellant does not pose a genuine, present and sufficiently serious risk to the fundamental interests of society. Although much of the focus is on the 18% risk of reoffending within two years (e.g see Grounds at paragraphs 4, 7, and 8), and some of the Grounds seek to restate the Respondent's views on the merits (e.g. paragraphs 6 and 9), we conclude that the defect identified above is covered by a holistic reading of the Grounds with particular reference to paragraph 10 – "*In any event the appellant is found to pose a medium risk to the public [37]. It is submitted that the FTTJ has failed to give adequate reasons for finding that he does not pose a genuine, present and sufficiently serious risk to the fundamental interests of society*".

32. We are reinforced in this notion by the fact that Judge Hanson in granting permission to appeal identified the challenge in the terms quoted at paragraph 17 above – in particular "*the Judge may have failed to properly understand the assessment in the OASys report which concluded the appellant posed a medium risk to the public, which does not support the conclusion that the appellant poses no genuine present or sufficiently serious risk*".

33. For the reasons given, we find material error of law in the decision of the First-tier Tribunal to an extent that the Decision must be set aside.

34. In the circumstances we did not invite Mr Melvin to amplify the other aspects of the Respondent's Grounds of Appeal, and necessarily did not invite Ms Doerr to offer any response. However, for completeness - and with the caveat that we did not hear argument - we note that it is unlikely that we would have found adequate merit in the other aspects of the Respondent's challenge. We note the following:

    (i) The Respondent's Grounds of Appeal plead a single ground – 'Failing to give adequate reasons for findings on a material matter' - which in substance is articulated at paragraphs 5-10.

    (ii) Paragraphs 1-4 set out the background to the challenge.

    (iii) The submission articulated at paragraph 5 appears misconceived in its premise that the Judge "*[sought] to go behind the sentencing Judge's remarks in giving the appellant credit for returning from abroad, whereas the sentencing judge found this to be an aggravating feature*". It was not returning that HHJ Tain found to be an aggravating feature, but leaving the UK at a time when the Appellant was suspended from his employment and subject to investigation. In isolation it would not be an error of law for the First-tier Tribunal Judge to take the view that the Appellant's return to the UK to face the consequences of his offending behaviour was indicative of a degree of responsibility and/or remorse.

(iv) In this context it seems to us unclear – and the representatives were not immediately able to assist - whether the Appellant, having returned to the UK, "*handed himself into the police*" (Decision at paragraph 51), or was arrested (either immediately upon arrival in the UK or at some point thereafter). Be that as it may, it seems to us realistic to acknowledge that the Appellant likely perceived that in returning to the UK was exposing himself to the consequences of his criminality.

(v) We accept that there is scope for criticising the Judge for equating a guilty plea with "*clear remorse*" (paragraph 57) - but are dubious as to whether that would provide a basis in itself for overturning the decision of the First-tier Tribunal.

(vi) Paragraph 6 amounts to a statement of fact and is not contain any clear pleading.

(vii) Paragraphs 7 and 8, recalling paragraph 4, focus upon the assessment of 18% risk of reoffending within two years, pleading in aid **MA (Pakistan) [2014] EWCA Civ 163**, arguing that "*low risk does not indicate no risk*". In circumstances where there is no requirement that there be 'no risk' of offending, and where the issue of threat to the interests of society is not determined by consideration of only the risk of offending, this basis of challenge as pleaded lacks merit.

(viii) Paragraph 9 reads as a re-argument of the merits of the case rather than specifically identifying any error of law.

35. In circumstances where the Judge had confined his analysis to the issue under regulation 27(5)(c), and had therefore not gone on to consider any other aspects of regulation 27 - in particular matters in relation to proportionality (reg. 27(5)(a) and the Appellant's personal circumstances (reg. 27(6)) - it was common ground between the parties before us that in the event of material error of law the decision in the appeal should be remade pursuant to a new hearing before the First-tier Tribunal with all issues at large. We agree that this is the appropriate approach.

36. We do not propose to make any specific Directions: standard Directions to be issued in due course by the First-tier Tribunal will likely suffice. It is not for us to suggest how the parties might wish to put their case, and the decision on remaking will be for the next Judge alone. However, we do think it appropriate to flag up the following matters as being potentially relevant to either or both the issue under regulation 27(5)(c) or matters relating to the Appellant's circumstances and proportionality; it is for the parties to decide to what extent they wish to clarify and/or address them.

(i) We have noted above that there is some uncertainty as to whether or not the Appellant was arrested immediately upon his return to the UK.

(ii) It seems to us that there is also some uncertainty surrounding the Appellant's departure from the UK for Gambia upon his suspension from work at a time when he was under investigation.

(iii) There is an apparent tension between what the Appellant told the First-tier Tribunal about returning to Gambia to visit his grandmother (paragraph 45), and what was seemingly said during the criminal proceedings about difficulties facing his wife, possibly in the Gambia (see sentencing remarks). HHJ Tain seems to have doubted the Appellant's veracity in this regard, whereas the First-tier Tribunal Judge appears wholly uncritical of the apparent suggestion that this was merely a continuation of a regular pattern of visiting his grandmother in Gambia (paragraph 45). Moreover the Judge does not seem to have identified that this was inconsistent with paragraph 5 of the Appellant's additional witness statement dated 17 March 2022 – "*Since I have been in the UK, I have not had any contact with anybody in Gambia*".

(iv) This latter statement seemingly downplays the notion of any continuing contact with Gambia. However, not only has the Appellant referred to visits to his grandmother, it is to be noted that in his GP records on 25 February 2019 he referred to being married with a wife in Africa. It is also to be noted that his mother returned to Gambia in September 2021 with an estimated date of return of April 2022. The Appellant's bank statements show significant sums being paid to a money transfer service – although the destination of such sums is necessarily not apparent on the face of the bank statements. The Appellant may wish to clarify – and provide supporting evidence of – his travel history, and that of his mother. He may also wish to clarify and provide evidence in respect of the money transfers. It may become germane to consider the extent to which he has retained significant contacts in his country of nationality.

(v) Notwithstanding the reference before the First-tier Tribunal to a "*current partner*" met in October 2021 (paragraph 43), the OASys report refers to a partner living in Portugal with their 3-year-old son. The Appellant may wish to clarify – and provide supporting evidence of – his relationship status and domestic circumstances

## Notice of Decision

37. The decision of the First-tier Tribunal contained a material error of law and is set aside.

38. The decision in the appeal is to be remade before the First-tier Tribunal sitting at Taylor House, with all issues at large, by any Judge other than First-tier Tribunal Judge Cameron.

39. No anonymity order is sought or made.

**Declan O'Callaghan**

Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

**Ian Lewis**

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

**2 June 2024**